IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3212 of 2005

For Approval and Signature:
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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JAYANTILAL LALLUBHAI MISTRY - Petitioner(s)
Versus
SUPERINTENDENT CENTRAL EXCISE RANGE-BILIMORA & 2- Respondent(s)

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Appearance :
MR AM RAVAL for Petitioner No(s).: 1.
DS AFF.NOT FILED (N) for Respondent No(s).: 1.
MR JITENDRA MALKAN for Respondent No(s).: 1.
NANAVATI ASSOCIATES for Respondent No(s).: 2.
UNSERVED-REFUSED (N) for Respondent No(s).: 3.

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 05/08/2005
ORAL JUDGMENT
(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The petition has been filed praying for following reliefs:

(a) To quash and set aside orders dated 01.12.2004 and 27.12.2004 whereby the petitioner is ordered to pay an amount of Rs.2,70,267.00 by the Central Excise Authority.

(b) To direct the respondent to recover an amount of Rs.2,70,267.00 from the respondent No.2 company

(c) To declare that respondent No.1 authority cannot recover an amount of Rs.2,70,267.00 from the petitioner who retired as a director since 1990.

(d) To direct respondent No.1 to recover the amount as demanded under order dated 01.12.2004 from respondent No.2 company on the basis of MOU dated 28.06.2001.

(e) To grant any other relief that may be deemed just and proper in the matter.

2. The brief facts : On 1st December, 2004 the petitioner was forwarded communication bearing F.No.LEGAL/LMP/CA No.7229-36/832 calling upon the petitioner to pay Rs.10,58,467/- towards excise duty and penalty of Rs.25,000/-. The said communication was followed up with the communication dated 27th December, 2004 (Annexure-C) wherein it was stated that “Out of four Directors, including you, the remaining three Directors namely, S/Shri. Chhotalal, Maganlal and Chandrakant all have accepted their responsibilities and paid each Rs.2,64,617/- of duty amount and paid each Rs.6,250/- of Penalty amount,

as ¼ part i.e. 25% of total dues. Now on your part i.e. ¼ part of Rs.10,58,467/- (Duty) and Rs.25,000/- (Penalty), you are required to pay the duty of Rs.2,64,617/- and penalty of Rs.6250/-.

3. You are requested to pay the above dues without further loss of time."

It is on the basis of these communications that the present petition has been moved.

4. Mr.Raval, learned advocate appearing on behalf of the petitioner, submitted that the petitioner has retired as a Director of respondent No.2 – Company since 1990. It is submitted that after receipt of communication dated 27th December, 2004 (Annexure-C) the petitioner had addressed a letter dated 7th January, 2005 to the Superintendent of Central Excise Range, Bilimora (respondent No.1) calling upon respondent No.1 to furnish details as to how the petitioner was personally responsible, but respondent No.1 has not furnished any reply. In the affidavit-in-reply, sworn by one Mr.Muljibhai Shankerbhai Parmar, Assistant Commissioner of the

Central Excise, Division Valsad dated 29th March, 2005, it is stated in Paragraph Nos.4, 5 and 6 as under:

> "4. I say that since the Order in Original No.99/MP/91 dtd.09.12.1991 passed by the then Collector, Central Excise & Customs, Vadodara has confirmed the demand of Rs. Duty 10,58,467/- (Duty of Rs.3,32,459/- + Duty of Rs.7,26,008/-) against M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd., Bilimora and since Shri Jayantilal Lallubhai Mistry was one of the directors at the material time in the period for which demand pertains (i.e. 1986 to 1988) and since there were 4(Four) directors of M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd., Bilimora and since 3(Three) have agreed to pay each ¼ part of duty and penalty, this office has requested Shri Jayantilal Lallubhai Mistry to pay ¼ part of duty of Rs.10,58,467/- i.e. Rs.2,64,617/- and ¼ of part of penalty of Rs.25000/- i.e. 6250/-.
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> 5. I say that since all the 4 (Four) brothers i.e. 1. Shri Jayantilal Lallubhai Mistry, 2. Shri Chhotalal Lallubhai Mistry 3.Shri Maganlal Lallubhai Mistry 4. Shri Chandrakant Lallubhai Mistry were directors of M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd., Bilimora for

recovery of Rs.10,58,467/- duty and penalty of Rs.25000/-, the letter were issued to all the 4 (Four) brothers. As a result of which 3 (Three) brothers except Shri Jayantilal Lallubhai Mistry have paid duty and penalty equally ¼ amount by issuing cheques and post dated cheques. As regards take over of M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd., Bilimora by M/s. LMP Precision Engineering Co. Pvt. Ltd., Bilimora is not known to the department. Presently Shri Prakashbhai C. Patel is the Chairman–cum–Managing Director of M/s. LMP Precision Engineering Co. Pvt. Ltd., Bilimora. Though Shri Jayantilal Lallubhai Mistry retired as Director in 1990, as stated by him the recovery is pertaining to 1986 to 1988 and as such the letter was issued to him for recovery.

6. I say that as mentioned by Shri Jayantilal Lallubhai Mistry that he retired as director in 1990 and since the recovery pertains to 1986 to 1988, this office issued letter to him to pay duty and penalty."

5. Respondent No.2 has tendered affidavit, through its Chairman & Managing Director, Shri Prakashbhai C.

Patel, and submitted that the demand in question pertains to an order passed against M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd., Bilimora which is a separate company from respondent No.2 – Company and at no stage respondent No.2 has taken over the assets and liabilities of M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd., Bilimora. It is, therefore, submitted that respondent No.2 – Company is in no way connected with the demand relatable to M/s. LMP Drilling and Mining Equipment Co. Pvt. Ltd. The affidavit-in-reply of respondent No.2 – Company was served on the learned advocate for respondent No.1 on 2nd May, 2005 and thereafter at the request of the learned advocate the matter has been adjourned from time to time. On 15th July, 2005, the Court had recorded "Mr.Malkan states that he is awaiting instructions in writing and prays for time.". Thereafter, the matter was not taken up on 29th July, 2005 and has come up today. When the matter was called out it was submitted by Mr.Malkan that he has no instructions and the Court may pass an appropriate order.

6. In the aforesaid circumstances, the matter is taken

up for final hearing and disposal. RULE. The learned advocates for the respondents respectively waive service of rule.

7. As can be seen from the impugned communications dated 1st December, 2004 (Annexure-B) and 27th December, 2004 (Annexure-C) it is an admitted fact that the demands in question pertain to limited companies and the petitioner has been called upon to make payment on the basis of being an erstwhile director of respondent No.2 – Company. Even the affidavit-in-reply filed on behalf of respondent No.1 categorically states that the demand is relatable to the two limited companies wherein the petitioner was one of the directors. The only ground, on which the petitioner has been called upon to discharge the liability, is that the petitioner was a director and the recovery pertains to period between 1986 to 1988.

8. The respondent authorities have not been able to point out any provision under which they are entitled to proceed against a director of a limited company. The position in law is well-settled that a

company and its directors are separate entities and rights and liabilities of both are independent and separate of each other. In absence of any provision in law which permits the Revenue to proceed against an individual director to effect recovery of dues of a limited company, the exercise undertaken by issuance of the impugned communications (Annexure-B & Annexure-C) cannot be permitted. Even in the affidavit-in-reply there is no averment to the effect that the limited company does not exist. To the contrary, it is stated at more than one place that both the demand of duty and penalty pertain to the limited company. The only ground on which respondent No.1 authority has called upon the petitioner to make payment is that other three directors of the Company have made payment of 3/4th of the liability arising in the name of the Company. There is nothing on record to indicate as to why and how and in what circumstances the other directors have made the payment. Not only that, there is nothing on record to show from which source such payment has flown from the directors to the department – whether from their personal account or from the account of the Company. Regardless of that,

once the entire liability of duty and penalty is raised in hands of the Company and there is no personal liability of the director concerned, in law the director cannot be called upon to make any payment to discharge the liability of the company. It is always open to the Revenue to proceed against assets of the limited company, in case the company is not discharging its liability.

9. In light of this fact situation the communications dated 1st December, 2004 (Annexure-B) and 27th December, 2004 (Annexure-C) are hereby quashed and set aside. In so far as prayers 8-(b) and 8-(d) are concerned, it is not necessary to issue any such directions for the determination of the controversy in the present petition and no such directions are required to be issued. It is the duty of the Central Excise Authorities to take appropriate action in accordance with law for the purpose of effecting recovery in so far as the limited company is concerned and no directions as prayed for can be granted.

10. The petition is, accordingly, allowed to the extent

indicated above. Rule made absolute accordingly. Respondent No.1 shall bear the cost quantified at Rs.5,000/- (Rupees Five thousand) payable to the petitioner.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**